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Sir Charuchandra Ghose Memorial Lectures. 1957

**THE RELATION OF THE INDIVIDUAL
TO THE STATE
UNDER THE INDIAN CONSTITUTION**

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Dated the 6th May, 1957.

P. N. SAPRU

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THE RELATION OF THE INDIVIDUAL TO THE STATE UNDER THE INDIAN CONSTITUTION

LECTURE I

PART I

General Aspects of the Problem

I deem it a privilege to be invited to deliver the lectures intended to perpetuate the memory of a great Judge. It was my good fortune to have come into contact with Sir Charu Ghose in my younger days and I have clear recollections of his vivid personality, which made itself felt in various spheres of our national life. He was a store-house of learning and wisdom and the judgments that he has left behind have left a permanent impression upon the Case Law of our country. For me the pleasure of delivering the Memorial Lectures is enhanced by the fact that he was one of my father's closest friends and I feel attached to his family by ties of close friendship.

Before dealing with the subject-matter of my lectures, it is perhaps permissible to say a few words about certain general aspects of the questions which a study of the relationship of the individual to the State, under our Republican Constitution, raises. Throughout the ages the human individual has busied himself with the problem of his relationship with his social group. This is not surprising for the important fact about the world we live in is that, as Alfred Adler puts it, "no human being was ever born except in a community of human-beings". To put it in a different way, there is no such thing, to use the language of Don Salvador de Madariaga, as an 'absolute individual', i.e. that no human being exists who does not contain a social element as well. Whether we look to the past or to the present, the problem of the right relationship between the individual and the society is a problem round which fierce controversies

have raged. States, societies, philosophers and statesmen have found themselves divided in their approach to it. Obviously, the process of civilization has intensified it for, as life becomes more diversified, individuals become increasingly conscious of their individual rights. In primitive societies the individual hardly counted for anything. The tribe's power over him was complete and all pervasive. It regulated the pattern of his behaviour, imposed its own code of ethics upon him even to the extent of the laying down of his taboos, forbade any individual thinking on his part and prescribed the mode of his worship. He belonged to a group and his individual life counted for nothing. Undoubtedly, the system had the advantage of enabling the human individual to lead a protected existence, firm in the assurance that his fellow-tribesmen would not leave wrongs done to him to go unavenged. But such a system could not, and did not, provide a soil for the growth of individual initiative, enterprise and character.

One of the remarkable facts about the human individual is his capacity to surmount the obstacles which his environment places in the way of his growth. For the story of man is the story of challenges and man's response to them. With time in most societies we find men outgrowing the tribal stage and discovering new ways of life. They were helped in this development by the many extraordinary men thrown up by them from time to time. These innovators and pioneers supplied them with new philosophies, new creeds, new social orders, which released their creative energy and made them both yearn and work for a fuller development of their faculties. Both the eastern and the western worlds had thus to pass through many revolutions, spiritual, material and technological, which brought about vast changes in men's lives and outlook. Included in the mental make-up and the race-unconscious of the modern individual and his social set-up is the inheritance left by the ancient cultures of India, China, Egypt, Palestine, Greece and Rome. Human society, in its search for a better life, has benefited in diverse ways by such great movements and revolutions as the Renaissance and the Reformation. No less important are the convulsions brought about in its political

and social pattern by such events as the American, the French, the Russian and the Chinese Revolutions.

Life at no time of recorded history has been completely static. No age and no people have been without religious and moral innovators who have had, as Bertrand Russell observes, an immense effect upon the life and thought of man. In fact, the history of the emancipation of the individual from social thralldom has interesting forms of similarity in both the eastern and the western world. Now coming nearer home, one of the things that the religions, the philosophies and the cultures developed in ancient times did in this country was to bring home to the individual his personal responsibility for making the best use of his life. They taught him that intimate as his connection with the society and the State no doubt was, there was a mental and spiritual sphere in which he could not, without grave injury to his personal well-being, efface himself by just denying the right to think, act or pray for himself. As the Lord Krishna says in Bhagawad Gita :

“ God resides in the heart of all beings, O Arjuna.”

Thus society has moved a long way from the stage when God was a tribal god. The individual's soul has a right now to seek independent contact with the Maker. Even the despotic systems of government, which were developed in this country, were regarded subject to a divine law which rulers could not change at their sweet will and pleasure. Is there any reason for wonder at the fact that we in this country, along with people of other lands, have now arrived at a stage in our mental evolution when we accept, as part of our creed, that man has, by virtue of his humanity and not by reason of his citizenship in any state, certain sovereign rights which the State must respect. For after all, the State is nothing more than a political machinery set up by the human will in order that men might live in security, peace and happiness. It is a human institution intended to make the good life possible for each individual. Clearly it is preposterous and even mischievous to deify or apotheosise the State.

By far the most important influence which helps to determine the life of a people is the form of its government. While, as de Tocqueville points out, the institutions of

government must not be confounded with society itself, government is, as a recent writer on political theory has put it, "man's unending adventure". "It is his heaviest collective and individual burden; it is his supreme hope of liberation from individual feebleness". The two vital parts which, even if definable, are not completely separable into which government falls have been stated to be, by Prof. Herman Finer,¹ as (1) the process of politics, and (2) the process of administration. The first process concerns itself with the origin, development and theory of the social will, so that laws or conventions may be evolved which will be socially acceptable or, at least, acquiesced in. The second, which is no less important, 'is the use of this reservoir of social will and power, by appropriate personnel, mechanical and territorial and procedural methods, to render specially governmental services to those entitled to them and to enforce duty where the will or the ability is lacking'. The State itself is distinguishable from other forms of human association by the power it possesses to compel, through the use of physical force, sanctioned by law, the obedience of the people in the territory over which it operates.

It will be noticed that it is to the organisation which declares its will and executes it with the use of force if and where necessary in a given territory, that we give the name of government. Thus Government is the state organised for the purposes of exercising all or any of the sovereign authority residing in it. For the proper discharge of its multifarious functions Government divides itself into various departments and the separation among them may be great or small according to the Constitution adopted by the State. This splitting-up of authority or power of the State is essential for the functions that the State has to discharge. To put it in another way, the function of government is to adjust the relations between the State and the individual, to provide the machinery for declaring and executing the will of the State and to promote the welfare of the citizens composing it.

¹ *Theory and Practice of Modern Government.*

I do not, of course, suggest that sovereignty is indivisible in the sense that it cannot be split up among a number of units, each independent within the limits assigned to it but all owing allegiance to a central common organ created for specific objectives and endowed with definite powers or even unlimited authority over all other units in happenings calling for emergent action. To this form of organisation we give the name of federation, confederation or quasi-federation. It is unnecessary to consider here the distinction between the State and the nation which, in my view, primarily is a psychological phenomenon.

The point I wish you to understand is that whether in a federal or unitary Constitution, it would be a grave mistake to underestimate the vast power which the modern State possesses and exercises in controlling, guiding and regulating all human activity. To say this is not to suggest that social institutions, other than the State too, do not, cannot, and should not, play a vital part in holding society together. Clearly the concept of society is wider than that of the State, for it covers all organised and unorganised activities of human beings as social beings. People obey the State not only because it possesses the coercive power to compel obedience but also because, at all events, in a democratic community the coercive power, residing as it does in a majority of the people and exercised as it is through procedures laid down by the law or the conventions of the Constitution, has the implicit consent, or the acquiescence of the people. The chief virtue of a democratic system of government is that it reduces the use of force in a State to a minimum. I do not mean to suggest that sanctions, ultimately resting on coercive force, can be dispensed with in a democracy, but it is, I think, correct to say that under it the State, as the common superior, seeks to attain its objectives with the willing assent or, at all events, the acquiescence of the people who owe allegiance to it.

So far I have concerned myself with defining what the concept of the State, or the government, which may be looked upon as its executive agency, is. Differences of opinion in regard to what the State should, or should not, do, *i.e.*, differences in regard to the question of the legitimate functions

which it may exercise and the amount of control over the individual with which it may be vested, have existed throughout the ages. Clearly, there are spheres in respect of which it is undesirable for the State to interfere with the life or the activity of the individual. Obviously, there are other spheres where individual interests clash with social interests or thwart life's purpose and intervention by the State in the social interests with individual rights is called for.

The generally accepted view in the 18th and 19th centuries was that there was a distinction between the primary and secondary functions of government, that whereas the former included responsibility for the maintenance of internal order and defence against external aggression, the latter concerned themselves only with its ministrant activities. Emphasis was laid on the primary functions and the ministrant functions were looked upon as something which the States might, but were not bound to perform. That distinction is no longer valid in the twentieth century. Increasing experience of *laissez faire* economics and searching criticisms by collectivist, Marxist and idealistic thinkers of our existing economic systems, have brought home to us the truth that, by being severely left alone to pursue their own happiness according to their own lights, unfettered by State regulation, State control or, even in many cases, social ownership of the means of production, individuals cannot exercise their freedom to attain either their maximum happiness or that of the community from which they cannot be separated without grave damage both to themselves and the society of which they are integral parts.

The dominant note of the social thought of our century is that individual freedom must not be equated with mere absence of restraint, for such a concept of freedom encourages aggressive members of the society at the cost of the others. Real freedom is only possible in communities which provide genuine equality of access to its exercise. Ethical considerations demand that the State should intervene by legislation or otherwise to equalise opportunities wherever and whenever the public welfare requires it to do so. There should be no privileged classes and, in any event, they must not be allowed to deny real opportunity for a rich and full life to all sections

of the community. The notion that the State is a purely negative institution whose intervention in economic affairs is harmful, has now yielded to its recognition as an instrument of public welfare.

The welfare state is thus based upon a frank acceptance of the position that its social service activities are perhaps as vital both for the progress of a society and the individual as those of maintaining internal order and ensuring it against its external defence. Today we know that between the individual and the society there is a very intimate relationship; an individual's life, character and capacity to earn a living are very much affected by it. The individual cannot, unaided by the institutions of the State, realize his destiny or express the uniqueness of his personality. The distinction between primary and secondary functions is completely obsolete and we are living in an age of the interventionist State. By trial and error we have come to appreciate that only by an expansion of their activities whether with or without socialism to include welfare and social security schemes for the benefit of their citizens, can States even maintain themselves in power and perform what used to be regarded as their primary functions. In simple language, we now know that social security, from the cradle to the grave, is the best insurance against violent upheavals, which upset the balance of a society and make human life a tragedy.

What were regarded as luxuries in earlier generations are the bare necessities of today. The advances that man has made in the physical and natural sciences, technology, medicine and other allied branches of knowledge make it possible to hope that, provided they are brought to the door of the common man and used by national States not for aggressive purposes but for building up a better life for the community, man will be able to liberate his creative energy for socially beneficent activities. In earlier ages man's effort was directed not so much in discovering the art of living as in a struggle to create the means of life. Our increasing conquest of nature enables us to visualize a time when, provided the vast energy which we possess is utilized for constructive and not mutually destructive purposes, it should be possible for us to re-model our social and economic system in such a manner as to make

it within the reach of each individual citizen, to attain a worthwhile standard of material, moral and aesthetic well-being.

I have pointed out how vital it is that the State should aim at the creation or, shall I say, evolution of a form of cooperative social order which would enable the individual to realise his destiny by an exercise of his creative faculties. The welfare State, which seeks to bring about this vast transformation in our existing economic and social structure, is thus based upon a recognition of the truth that the freedom of the individual should be linked up with collective welfare. Specific guarantees of various liberties in constitutional documents cannot yield satisfactory results unless there is the will on the part of the people to see that their exercise will not lead to a perversion of the common good. Individuals, groups or classes possessing economic strength have, within their power, to dominate in a modern community the lives of their fellow-beings, to the extent of even determining the purposes for which the machinery provided by the Constitution shall be used. It is not necessary for me to point out the power or control which such organs as the radio, the press, the television can place in the hands of powerful individuals or groups. Is it, therefore, to be wondered at that genuine believers in democracy think it essential that the control of the principal economic agencies should be vested in the State rather than in the hands of profit-seeking individuals not very much interested in the welfare of society as a whole ?

Today, we have arrived at a stage in social thought when as Lord Beveridge well points out, " private control of means of production to employ others at a wage in using those means, whatever may be said for or against it on other grounds ", cannot be described as an essential liberty of any people.

I do not think that it is necessary to labour the point that in order that man might be effectively free to devote himself to the development of his efficient self and resolve the conflict between his social self and his repressed instincts, it is essential for the State, as representing the society of societies, to project objectives and concentrate upon their attainment. Civilization is the art of cooperative living which needs

organised knowledge as also, and not less importantly, artistic and non-material values for its growth. To imagine that it can reach its peak in an environment of ignorance, poverty, idleness, squalor and disease among men and women, who go through life's toilsome journey without knowing what the morrow might bring for them, is to live in a world of complete unreality. Men cannot choose the good and eschew the evil unless their political, social and economic organization helps to enkindle in them a crusading zeal to seek justice and pursue it. Frankly, there is much in our social life which makes for a persistence of vast wrongs. Essential freedoms, such as the power to form one's own opinion and to express it in public or private, to form associations for political, religious or social purposes, to move freely throughout the territory of the State and to choose one's own profession, business, trade, or occupation and possess the right to earn an income, which one can spend within legitimate limits as one pleases, do not stand on the same footing as claims or guarantees for private ownership or control of means of production. An unrestricted recognition of any such right would make a choice of economic systems difficult and might indeed turn the democratic State into a mere agency for the perpetuation of the class structure of our existing society.

I have already pointed out that the aim of a welfare State is to provide opportunity for the development of human personality and that the individual cannot be looked upon as an isolated, separate being without any system of relations with other individuals. I think it fair to say that without an adequate social machinery which, in the conditions of our society, only the State can provide a right attitude towards life cannot be developed by an individual. I think it needs no argument to convince you that a world, in which we had men of one pattern and there was no diversity of attitudes, is bound to stagnate. It is for this reason that some of the world's leading political philosophers have insisted on including in the context of freedom the right to differ and dissent and its corollary the right to make own mistakes. Let it, however, be remembered that human progress cannot come about without collective endeavour organized by what we have now come to call the welfare State.

I have endeavoured to state what, in my judgment, the basic theory underlying the welfare State is. Let me now turn to our Constitution and examine for ourselves how that theory has influenced and been worked out by the founding fathers in the Constitution that they have provided for this country. You will notice that apart from its written and quasi-federal character, our Constitution is also distinguished by (a) the emphasis it places upon fundamental rights enforceable through the machinery of our law courts, at the head of which is the Supreme Court, and (b) the directives of State policy which, though non-justiciable, have, nevertheless, been regarded as fundamental by the Constitution-makers.

PART II

Directive Principles

I shall first invite your attention to the directive principles which, the sovereign people expect the Union and the State Governments they have set up to observe in the formulation of their policy. They constitute, so to speak, the instrument of instructions which every government working the Constitution and which every legislature enacting laws must bear in mind. The sovereign people, speaking through the Constituent Assembly, regarded the directives as fundamental in the governance of the country and though they have not made them justiciable, they, nevertheless, expect governments and legislatures to bear them in mind in making laws and formulating their policies and programmes. Articles 38 to 50 lay down these principles. A perusal of these articles will show that they make it incumbent on the State to pursue policies which will promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice social, economic and political shall inform all the institutions of national life. This is the aim of these objectives.

In particular, they enjoin those in authority to pursue policies calculated to secure to all citizens full and equal opportunity to earn an adequate means of livelihood (Article 39A). They further enjoin it to ensure that the ownership of

the material resources of the community are so distributed as best to subserve the common good. In other words, not the accumulation of wealth in single hands but its distribution in such a manner as will promote the happiness of all individuals and not only some is what State policies must aim at. They further direct that the economic system should be so worked as not to result in the concentration of wealth and means of production to the common detriment. It will be observed that there is no direction that the means of production must not be individually owned, but there is a clear enunciation of the principle in this sub-Article that the State must prevent the growth of monopoly of capital to the detriment of public welfare, and that the means of production must be such as is likely to serve a social end.

In the just social order visualised by the framers, equal pay for equal work for both men and women is indicated. Clearly, the spirit of the Constitution is against an unequal treatment of women in the matter of wages. The health and strength of workers as also that of children is to receive special attention and it is directed that citizens must not be forced by economic circumstances to enter avocations which are unsuitable for their age or health. Finally, there is an injunction against the exploitation of childhood and youth, it being incumbent upon the State to advance the interests of these classes. Apparently, the founding fathers had a strong feeling that India being a land of villages, the ancient institution of the village *panchayat* could provide opportunity for the exercise of self-governing rights by our rural population and hence importance has been attached to the organization and development of village *panchayats*.

Again on the State has been cast the positive duty within the limits of economic capacity and development, of making effective provision for securing education, work and public assistance in cases of unemployment, old age and disablement for all citizens. It may be further noted that the State has been directed to make provision for securing just and humane conditions of work and for maternity reliefs. Clearly, educational opportunity is fundamental to economic opportunity and for this reason the Constitution visualises free and compulsory education for all children up to the age of 14 years.

One could wish that the directive here was more specific and mandatory. In order that opportunities are equalised, the State has been enjoined to promote the educational and economic interests of the backward classes and to protect them from exploitation. It has been further laid down that it should be the endeavour of the State to provide for what might be called a national minimum, for all agricultural and industrial workers. For this is the purpose of Article 43. For the unification of the country common civil laws have everywhere been found to be of special importance. Hence there is a direction for the evolution of a uniform civil code for all citizens. The founding fathers found that India's curse was its neglect of the Scheduled castes and Scheduled tribes and other oppressed sections of the community. There is an injunction to bear them in mind and Article 46 is relevant on this point.

Importance has been attached to raising the level of nutrition, the standard of living and the improvement of public health and for this purpose prohibition is visualised. Agriculture and animal husbandry are specifically mentioned, and perhaps rightly so, as ours is a land of villages. Other objectives to be kept in mind have been stated to be the separation of the judiciary from the executive, a combination of which at the lower levels in our criminal courts is a legacy from the old British days, and the protection of monuments of artistic and historic interest. In Gandhiji's land it was but right that importance should have been attached to the promotion of international peace and security, the maintenance of just and honourable relations among nations, the fostering of respect for International Law and treaty obligations and the encouragement of a settlement of international disputes by arbitration. The importance of these directives is that governments and legislatures are expected to follow policies which will promote them.

I have considered it necessary to draw your pointed attention to the principal features of the directives in order to indicate that the founding fathers have indicated clearly that the social order they aim at is one which would make opportunity universal. What, in simple language, the directives do is to supply tests at election time for application •

by the electorate in estimating the success or otherwise of governments in power. They represent an attempt at evolving principles which the nation had come to accept in its heroic struggle for freedom as basic for the good life. It is apparent from the directive principles that the founding fathers were no believers in the *laissez-faire* State. Clearly they were visualising an interventionist State which would not hesitate on a planned basis to harness the material advantages and the technological advances of the age for developing conditions of life helpful to all citizens for the use of their rational faculty, liberty and social energy for fruitful purposes. The framers of the Constitution did not look upon human nature as immutable, or individual or social destiny as pre-destined. For them the State was an organisation which should help its citizens to be free, rational and happy with well-marked zones of privacy which will not be invaded upon but capable by cooperative effort to do their utmost for the social welfare.

From what I have said, it should be obvious to you how important it is, if the Constitution is to be worked properly that the political, social and economic programmes of parties working the Constitution should reflect the spirit of the objectives. In this background, any overstepping of the limits or any disregard of the directives in a contrary direction would be against the mandate embodied in the Constitution by the founding fathers. To say this is not to suggest that the Constitution, including the directives, cannot be changed, or modified by the manner prescribed in the Constitution itself. There are elaborate provisions detailing the manner in which alterations may be effected in the Constitution. The thesis I am, however, developing is based upon the assumption that there is a willingness on the part of the political parties working the Constitution to accept its fundamentals in letter and in spirit. A further assumption is that there is vigilance in this regard on the part of the electorate. The directives supply the criterion by which the success or failure of a political party in power must be judged and this has to be remembered by the electorate. It is true that legally these objectives are unenforceable in a court of law but actually the political sovereign, *viz.*, the electorate,

can, if it is vigilant and intelligent, use these Objectives as a yard-stick for judging the worth, at times, when he is called upon to vote, of political parties and their programmes and achievements. Their principal utility is that they make intelligible in simple language to the common man the philosophy of the welfare State, on which the State is founded.

The question may well be asked whether it was at all necessary or desirable for the Constitution-makers to lay down directives, which, they knew, were neither justiciable nor had any sanction other than that of public opinion expressed at a general election or a bye-election to back them. I shall attempt to answer this question.

One finds it frequently said that a written Constitution tends to be rigid as it represents an attempt by one generation to limit the freedom of action of future generations. Britain is quoted as an example of a country possessing a flexible Constitution which, by making no distinction between Constitutional and other laws, has made it possible for fundamental changes from time to time to be made in the Constitution without, what Lord Justice Denning calls, 'a great deal of fuss and bother.' Again, the criticism is heard that human rights, which are enshrined in a Constitution, such as ours, are better observed by a people like the British who have been nurtured and brought up in liberal traditions, who have intelligent and resolute Parliaments and strong and independent judges than many other western countries with Constitutions containing in flamboyant language declarations of rights without any effective provision for their enforcement. In simple language, the question I am posing is whether given responsible government, it was at all wise for the founding fathers to enunciate what the fundamental principles which governments in power must observe should be or to define fundamental rights with that precision which has been attempted by our Constitution-makers.

The question raised is an important one and needs an answer. The analogy of Britain, which has a peculiar history of a continued evolution from an absolutist State to a democracy based on the concept of the welfare State, is misleading and cannot be applied to a country such as ours. In the first place we were establishing not only a new State

but also visualising a new social order for a population differing in cultures and even in some cases racial composition. In the second place we had no fundamental principles which had got embedded in what could be called our Common Law and which were accepted as part of our inheritance by all sections of the people. Guidance was needed by those who were to run the Government or to found political parties as to the principles which the framers of the Constitution regarded as fundamental in the making of laws and the governance of the country. The judiciary, which was to be an independent one in our Constitution, had to be provided with a set of principles by which to test the reasonableness or otherwise of laws enacted by the various bodies empowered to do so.

It may be that in laying down these principles as directives, the founding fathers were, to some extent, influenced by the attitude adopted at times by the U.S.A. Supreme Courts towards social, economic and labour legislation. *Writs of Certiorari, Prohibition, Mandamus and Quo-Warranto* were unknown to the Constitutions we had enjoyed before, except perhaps in a limited sense in the Presidency High Courts. Thus fundamental principles had to be evolved and put into writing, so that not only those who work the Constitution but our people generally might know without much difficulty what we were aiming at. A climate had to be created in which democracy might work successfully and rouse the enthusiasm of the common man. Assumptions could not be made that our men knew either what democracy was or what the welfare State in a democracy stood for. The principles enunciated were thus to act as guides for the formulation of programmes by political parties desirous of working the Constitution for unless there is an agreement on fundamentals, democratic government breaks down or works at best creakily.

One of the basic reasons why liberal and social democracy gave way to totalitarian regimes in Europe before 1939 was a lack of agreement in regard to the fundamentals of State policy. Law, if it is to be the expression of truth, beauty and goodness in life, should not be allowed to become an instrument of expressing the interests or preserving the privileges

of classes and vested interests, for if it were to take such a direction, liberty would not triumph and would indeed become purposeless. The average citizen had to be made aware in a land where, at all events in recent times, the social conscience was weak, what are the things that he should regard as a matter of duty and honour to do. The founding fathers were not looking upon democracy as an instrument in the hands of private monopolists or groups to get things done in their way but were rather seeking to permeate the community with the idea that positive liberty, including in that term, liberty from exploitation, is a long-term process to be achieved by cooperative effort on the part of the State and the citizen. They were searching for that optimum stage of development when justice would not be a reflection of any class interest but of the society as a whole. Viewed in this light, the directive principles represent the noblest feature of our Constitution, for it is upon a clear observance of them that our State can truly develop into a welfare State.

Though the directives have been declared to be unenforceable in a court of law, would the courts be justified in ignoring them in interpreting the Constitution or the other laws of the country? The Constitution-makers have directed that the Constitution should be interpreted according to the principles laid down in the General Clauses Act. Occasions are not infrequent when the provisions of a statute or clause in a statute give rise to difficulties because they are worded in ambiguous language or their meaning is otherwise one which gives rise to doubts. Irish Courts in interpreting laws have, even though the directives in that Constitution are not justifiable, looked into them as a guide for purposes of interpretation when the meaning of law is not clear. Is it possible or wise to ignore them altogether when, for example, a court has to form a judgment as to the reasonableness of the restriction in, say, a case under Article 19 of the Constitution? The U.S.A. Courts had to evolve a doctrine of police power in order that the State might on suitable occasions be able to interfere with private rights in the interests of the health, safety and morals of the community. Should the directives not be utilized by courts to discover a criterion for what may be regarded as necessary for forming a judgment on the

reasonableness or otherwise of a restriction imposed by the State. In the event of a clear collision between Chapter III and IV of the Constitution the former will undisputedly prevail, over the latter.¹

The question that arose in the case of *State of Madras vs. Srimati Champa Kaur Dorairajan*, was as to whether the right to get admission in an educational institution of the type mentioned in clause (2) was a right which under the Constitution could be denied to the petitioners on the sole ground of their being Brahmins and not being members of the community for whom the reservations have been made. The view of the Supreme Court was that the communal G.O. was opposed to the Constitution and constituted a violation of the fundamental rights guaranteed to citizens under Article 29(2). In delivering the judgment of the Court Das J. observed that :—

“ The directive principles of State policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights. In our opinion, that is the correct way in which provisions found in Parts III and IV have to be understood.”

He went on to observe that :—

“ . . . so long as there is not infringement of any fundamental right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the directive principles set out in Part IV, but subject again to the Legislative and Executive powers and limitations conferred on the State under different provisions of the Constitution.”

But it would be open to the Courts to reject a doubtful challenge to the constitutionality of a law by seeking support from the directive principles of State policy. In the case of the *State of Bihar vs. Maharajadhiraj Sir Kameshwar Singh of Darbhanga and others* ² Das J. observed that :—

“ In the never-ending race the law must keep pace with the realities of the social and political evolution of

¹ *State of Madras vs. Srimati Champa Kaur Dorairajan*, 1951 S.C.R. 525.

² 1952 S.C.R. 889 at 997.

the country as reflected in the Constitution. If, therefore, the State is to give effect to these avowed purposes of our Constitution we must regard as a public purpose all that will be calculated to promote the welfare of the people as envisaged in these directive principles of State policy whatever else that expression may mean."

It may further be pointed out that in the case of the State of West Bengal *vs.* Subodh Gopal Bose¹ discussing the question as to the extent to which differentiation may be made under subclause (f) and clause (1) and clause (5) of Article 19 Patanjali Sastri, C.J., referred both to the preamble and the directive principles of State policy as having set out the goal of a social welfare State which must by its nature "involve the exercise of a large measure of social control and regulation of the enjoyment of private property." The point is that he took judicial notice of the directives for the purposes of interpreting the Constitution.

It is, therefore, permissible to suggest that the fact that the directives are non-justiciable does not preclude courts from looking into them for guidance in interpreting the reasonableness of laws challenged on the ground of their incompatibility with Article 19 or for that matter with any other Article in the Constitution.

If this view is accepted as correct, they should be of help not only to the electorate but also to courts when they happen to be interpreting laws suffering from ambiguity or are seemingly unreasonable from the point of view of justice to the individual affected by them.

In the case of Rameshwar Prasad Kedar Nath *vs.* District Magistrate² opinion was expressed by one of the members of the Court deciding the case that it was open to the Court in considering the question of the reasonableness of the restrictions laying down any law to look at the directive principles of State policy and in point of fact the Court did refer to Article 33 and Article 39A which lay down that the

¹ 1954 S.C.R. 587 at 599.

² A.I.R. 1954 Allahabad 144 at 145.

State shall in particular direct its policy towards securing that citizens, men and women equally, have the right to an adequate means of livelihood.

Thus though the directives have not been made justiciable, it is quite clear that they provide the philosophy underlying the Constitution which forms the basis of our State and are thus useful for interpreting the minds of the legislature in those cases where the language used by it suffers from ambiguity or confusion. I think that it would have been more helpful to Courts if, apart from directing them to interpret the Constitution according to the General Clauses Act, an article or sub-article had also been added in the Constitution itself requiring courts to bear in mind in deciding the question of reasonableness or otherwise of the laws, the principles laid down in the directive principles of State policy.

LECTURE II

Fundamental Rights

In the last lecture my endeavour was to place before you a few thoughts on the directive principles of State policy which embody, as it were, the philosophy upon which our Republican Constitution is based. I shall now invite your attention to what may be called its most distinctive feature, namely, fundamental rights enforceable through the machinery of our law courts, at the head of which is the Supreme Court. Our Constitution-makers knew that in the British Constitution there was no guarantee embodied in any constitutional document of individual rights. In fact, the British Constitution being an un-written one and Parliament being a completely sovereign body, no law can be challenged in British courts on the ground that it was *ultra vires* the Parliament which enacted it. Our founding fathers knew that even in the Constitutions of the member States of the Commonwealth of Nations such as Canada, Australia and South Africa, no Bill of Rights such as forms the arc of the covenant in the U.S.A. Constitution was to be found. The British Constitution has a history of continuous growth which obviated the necessity for the British people of having anything in the nature of fundamental rights. The British people have certain characteristics which differentiate them from those of other countries. They have a temperamental aversion for abstract declarations. It is not in their nature to indulge in speculation for purposes of constitution making either on the rights of man or on the rights of citizenship. They have no fundamental laws recorded in any single document which cannot be changed by the ordinary process of legislation. The rights of personal freedom, freedom of discussion and freedom of association are not in the nature of special privileges safeguarded by the ordinary law of the land; they are merely part of the ordinary law of the land as enforced by courts.

To use the language of Professor Dicey "Individual rights under the British Constitution are the basis not the results of the law of Constitution". Both the Magna Carta and the Bill of Rights, to take two examples from their eventful history for the purpose of illustrating what I have been saying, were concerned with the maintenance of certain ancient rights which, it was asserted, had been invaded rather than defining human or civic rights in general. There was nothing in these documents which could be said to make the beginning of a new basis for the state or for the society. The approach was one which tended to emphasize the continuity of English institutions.

The people of Canada, Australia and the white settlers of South Africa were either of British or European stock and in giving shape to their Constitution they brought to bear upon their tasks an out-look coloured by their upbringing in British traditions. Here in our country we were breaking away like the people of America and Ireland from our past. It is but natural that a people who strike a new path should delve into first principles for their inspiration. We had seen in our country throughout the ages a disregard of the rights of the individual. We had seen him insulted, we had seen him ill-treated and ignored. We had noted that though, as the early pioneers of the national movement often used to emphasise, equality of treatment had been promised to us by the Charter Act of 1833 and Queen Victoria's Proclamation of 1858, there was, in fact, in the administration of the country, no actual equality between Indian and European. We had noticed that the promise in the British Queen's proclamation that "It is our further will that, so far as may be, our subjects of whatever race or creed be freely and impartially admitted to office in our service, the duties for which they may be qualified by their education, ability and integrity, duly to discharge" had remained largely unfulfilled. We had been driven to the conclusion that no such thing as equality of individuals was possible, particularly if they belonged to different races, in the system of government under which we had been operating and that the government imposed by Britain on this country could not be said to have been one for the equal benefit of all sections of

the community. In the various efforts which had preceded the making of our Constitution such as, for example, the Nehru Report in 1927 and the demands formulated by Indian moderate leaders at the Round Table Conference, a case had been put forward for an enunciation of fundamental rights in any Constitution to be framed for this country. Is it to be wondered at that when we came to frame actually the Constitution we should have attached importance to the enunciation of certain basic principles which courts would in a fit case coming before them compel the new government to observe ?

The fact should not be overlooked that our founding fathers were framing a constitution for a country with many divergent elements in its population. Some of our people had been the victims of evil social customs which had denied to them a life of equal opportunities. Our social structure could not be said to be fair or just to our women. The Constitution itself was framed by us in an age notable for the attention that the United Nations Organisation had been devoting to the problem of human rights. From the days of Tom Paine's Declaration of Rights down to the days of the discussions on the U.N.O. Charter of Human Rights, intelligent men and women had busied themselves with the problem of formulating those rights which are basic for the development of human personality. It was, however, left to our age to work them out in the draft covenant of Human Rights. For Gandhiji the individual had always been important and his doctrines were explosive in the emphasis that they placed upon individual conscience. Thus it would have been astonishing indeed if, with this background, we had not found ourselves influenced by the prevailing phase of thought on the problems of human rights in our Constitution making. Moreover, in formulating fundamental rights we were merely following the pattern of most modern countries which have given Constitutions to themselves. It was only to be expected in these circumstances that fundamental rights should have found a place in the Indian Constitution as actually framed by our founding fathers. They were, for one thing, apart from everything else, helpful from the point of view of assuring our racial and religious minorities a fair deal in the new India in which they were hereafter to live.

Before classifying and commenting in a very general way on the rights to be found in the Indian Constitution,—and I can only treat the subject in a lecture of this size only generally,—it is perhaps desirable to point out certain important aspects in which they differ from the concepts of inalienable human rights on which much has been written in recent years. While some of the rights are limited to persons who are citizens of India, others extend to both citizens and non-citizens. All are, however, changeable by a special procedure laid down in the Constitution itself. To put it shortly, they can be amended, *i.e.*, enlarged, curtailed or completely abrogated, by an Act of Parliament, provided that such a legislative measure is passed by a majority of the total membership of each House of Parliament and by a majority of not less than two-thirds of the members of that House present and voting. They can also be suspended following a declaration of grave emergency by the President. You will see that because of the comparative ease with which they can be amended, they cannot be described as inalienable in the sense that no human agency can touch them and that they must be regarded valid for all generations. Obviously the founding fathers knew that they were providing a Constitution for a rapidly changing country in a dynamic world and that it would not be right for them to lay down rigid principles which may not suit succeeding generations in the light of the experience gained by them. During the nine years that the Constitution has been in existence some of those rights have in fact in some directions been modified by Parliamentary legislation, necessitated at times by the decisions of our law courts. Sanctity no doubt should attach to rights intended to maintain a proper balance between the individual and the State, but it would be clearly wrong to refuse to amend them when a proper case for so doing is made out or when to refuse to do so may be the prelude for avoidable social or economic conflicts and agitations. There is nothing immutable about human institutions and a too great reluctance to interfere with something which obviously calls for intervention can at times encourage extra-constitutional or revolutionary activity. It cannot, therefore, be said that the attitude adopted by our founding

fathers towards the way in which those rights might be amended was unreasonable. After all the most effective guarantee for basic liberties is a vigilant public opinion determined to maintain free institutions. Constitutions and laws can help the growth of but not be a substitute for that opinion.

The suggestion that constitutional arrangements in India should guarantee certain fundamental rights was rejected during British days both by the Simon Commission and the Joint Select Committee of the British Parliament on the ground that such a declaration would not prove to be of any practical value. While some of the fundamental rights have a distinct similarity with those embodied in the universal declaration of Human Rights which was adopted by the General Assembly of the United Nations in 1948, their practical utility from the point of view of the common citizen is much greater than that visualised by that body. Human rights formulated by the General Assembly which an individual is supposed to possess by virtue of his common humanity and not by reason of his citizenship in any particular State are merely in the nature of directives, or objectives or goals to be achieved by States without any sanction to enforce them. They are for that reason comparable with our directive principles of State policy rather than with fundamental rights which have been made enforceable through the machinery of our High Courts and more particularly the Supreme Court [*see the State of Madras vs. V. G. Row.*¹] They are in fact analogous to the Bill of Rights in the Constitution of the United States or the Basic Rights which have been elaborated with some care by the Constitution-makers of both Japan and the new German Federal Republic. The point, however, that I wish to make is that our founding fathers have not contented themselves with merely enunciating some general principles without providing for their enforcement. They have distinguished between rights which in the existing conditions in this country could be judicially enforced and short and long terms objectives which they would like their State to pursue but which they feel are not, in the context

¹ 1952 S. C. R. 597.

of life in this country, possible to be given effect to by the judicial process. Had these rights not been enunciated, the life of the average citizen in a country where democracy has yet to take firm root would have been at the mercy of an executive deriving authority from legislatures in which a party system has yet to develop. By making the law courts the adjudicating authority in cases for which appropriate writs under Article 226 or Article 32 are available, the citizens have been assured that their basic liberties will be protected by independent law courts by a quick and inexpensive remedy and that they will not be left without remedy when their rights are infringed by the executive government. That, in the making of laws every citizen of 21 years and over has been given a share is clear for adult suffrage is one of the basic rights guaranteed by the Constitution (Article 326). Objection may however be raised that most of the rights are not in the nature of categorical imperatives and that power has been given to the legislatures of abrogating, abridging or restricting them even to the extent, it may be of extinguishing them in certain cases. This is a valid criticism and I intend to consider it a little later.

Meanwhile let me point out that while the rights of man have been enunciated, nowhere have our Constitution-makers laid down his duties or obligations.

The position of the individual in a free society such as ours is one of heavy responsibility. Normally it is obligatory on every individual in every democratic community or State to obey the laws of the land. This, of course, cannot mean that he cannot seek to alter them by constitutional or legal means, that is, by methods which the Constitution freely allows people to adopt. Occasions are, however, conceivable when an individual might well feel that a law made with the approval of Parliament or a State legislature is one which he cannot conscientiously as a moral being obey. The Gandhian philosophy is unique in the emphasis it places upon individual conscience; it lays special stress upon the right of the individual to dissent from duly promulgated laws when he finds them inconsistent with the laws of his own inner being. The choice to disobey a law cannot and should not, even according to that philosophy, be made in a lighthearted manner

by any individual conscious of his responsibility to the State. For the dangers of disobedience as should be apparent to every thinking individual from a social point of view, are, in most cases, much greater than those of obedience. Be that as it may, one thing that is clear is that an individual who disobeys the law must be prepared cheerfully to bear the penalty for doing so. Constitutions and laws cannot recognise that right. Whether an individual will be able by so doing to melt the heart of constituted authorities in the State who look upon the law as a just and moral one depends upon the nature of that law and the intensity of the conviction that it is on firm moral ground on the part of the authority promulgating it. Certainly law and law courts cannot recognise the right of an individual to disobey the laws on the ground of serious ethical objections to them. I have considered it necessary to mention this as in days when we were under alien rule it became necessary for the best of us to disobey laws and the habit of doing so still persists and finds occasional expression in the form of either individual or mass civil disobedience. The dispute relating to this issue has not escaped public ventilation even in our law courts ¹ [*see* Dr. Ram Manohar Lohia *vs.* Superintendent, Central Prison, Fatehgarh & others ¹.]

I do not think it possible to discuss at any length the various liberties which these rights guarantee. Some of them are concerned with laying down what the State must not do. They are in the nature of absolutes admitting of no qualifications which it is obligatory on the State to observe. This will be clear to you by a glance at Articles 14, 15, 16(2), 18 [inserted by the Constitution (First Amendment) Act, 1951], Articles 20, 21, 22, 24, 27, 28, 29(2), 30(2) and 31. Again some of the rights referred to in these articles are in the nature of rights which an individual possesses not only against the State but also other members of the community. Illustrations of such rights will be found in Articles 15(2), 17, 23 and 24. Apart from the rights referred to above, we have articles laying down specific guarantees of certain basic liberties. They are mentioned in Articles 19, 25, 26, 27, 29, 30 and 31.

¹ A.I.R. 1955A 193.

To the enumerated articles may also be added Article 32 which confers the right on individuals to move the Supreme Court by appropriate proceedings for a judicial enforcement of the rights enumerated in Chapter III of the Constitution. There is a further guarantee that these rights shall not be suspended except and otherwise as provided by the Constitution. Attention may also be drawn to Article 33 which empowers Parliament to modify fundamental rights in so far as the members of the Armed Forces or what might be called police forces are concerned. It may also be further pointed out that Article 34 authorises Parliament to protect by an indemnity law any person, in either Union or State service or for that matter any other person, for an act or acts done by him for maintaining or restoring order where martial law was in operation.

You will notice that broadly speaking the fundamental rights in our Constitution assure to all citizens freedom of speech and expression, the right to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire, hold and dispose of property and to practise any profession or to carry on any occupation, trade or business. They further guarantee all persons equality before the law and the equal protection, *i.e.*, impartial administration of the laws. Discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them is definitely prohibited. The Constitution-makers with the experience that they had of how this equality clause had been interpreted by law courts in, for example, the United States have further laid down that no citizen should be subject to any disability, restriction or condition on grounds only of religion, race, caste, sex, place of birth or any of them in regard to :—

- (a) access to shops, public restaurants, hotels and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Women and children have not been forgotten for there is an express clause permitting the State to make special provision for them. Further the Constitution-makers have expressly laid down that there should be equality of opportunity for all citizens in matters relating to employment or appointment in any office under the State and that no person should be discriminated against in respect of public employment only on grounds of religion, race, caste, sex, descent, place of birth, residence or any of them. There are elaborate provisions prohibiting untouchability which has been made an offence punishable in accordance with laws to be passed in respect of it. Guarantees for personal life and liberty have been provided. Traffic in human beings and forced labour have been banned.

The founding fathers have not overlooked the importance of cultural and educational rights and both linguistic and religious minorities have been given appropriately the right to establish educational institutions of their choice. The State has further guaranteed that it shall not discriminate against any educational institution on the ground that it is under the management of a minority whether based on religion or language.

The purpose for which and the conditions subject to which there may be compulsory acquisition of property are laid down in the various clauses of Article 31 and implicit in that Article is a distinction between what I would call feudal and non-feudal property. Apparently the founding fathers felt that a qualified guarantee in respect of property rights was also needed. There are provisions in the Constitution protecting various interests and guarding them from what might be called unfair treatment. These rights depend for their ultimate sanction upon the machinery of our law courts. The Constitution therefore wisely contains provisions for the independence of the judiciary and vests the highest courts with the power of interpreting them.

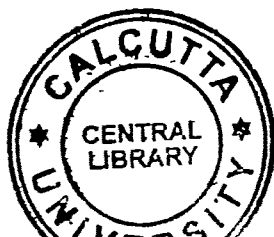
Before going further, it may be pointed out that though these rights have been made enforceable by Article 32 by the Supreme Court and by Article 226 by the High Courts, courts have not been conceded any general power to declare laws void or invalid on the ground of their being either

opposed to the spirit of the Constitution or contrary to the principles of natural justice. There is nothing in our Constitution analogous to the 9th amendment to the Constitution of the United States which asserts that "the enumeration in the Constitution of certain rights shall not be construed to deny or discourage others retained by the people." It is well known that U.S.A. courts claim to possess the power to declare a piece of legislation invalid not only on the ground of its conflict with any fundamental law of the land but also because it is inconsistent with some supposed principle of natural justice as they conceive it to be. In the well known case of *Gopalan vs. The State of Madras*,¹ the question was raised before the Supreme Court whether the notions of natural justice could be imported in considering the contents of the various sections of a Preventive Detention Act and the procedure laid down for taking action therein. The view which prevailed with the majority of the Court was, to use the language of Kania, Chief Justice, that :—

"The courts are not at liberty to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. It is also stated, if the words be positive and without ambiguity, there is no authority for a court to vacate or repeal a statute on that ground alone."

Further, the Supreme Court by a majority in that case decided that the words "procedure established by law" rule out the importing of the notions associated with the 'due process

¹ 1950 S.C.R. 88.



clause ' in the U.S.A. Constitution. The substitute provisions for the " due process clause " are to be found in our Constitution in Article 21 and Article 31 (1). I quote those Articles :—

“ **Article 21.** No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 31(1). No person shall be deprived of his property save by authority of law.”

Kania, C.J., pointed out that the word “ due ” in the U.S.A. Constitution gives jurisdiction to the court to pronounce what is due otherwise than according to law. He observed “that the ¹ deliberate omission of the word ‘ due ’ from Article 21 lends support to the contention that the justiciable aspect of law, *i.e.*, to say, to consider whether it is reasonable or not by the court does not form part of the Indian Constitution.” Mr. Justice Douglas in his Tagore Law lectures entitled “From Marshall to Mukherjea ” wisely and pertinently remarks that he yet discerns in Indian decisions a flavour of due process when it comes to questions of substantive law. He particularly refers in support of his view to the case of *Harla vs. the State of Rajasthan*, where ² the Council of Ministers acting for the Maharaja during his minority had enacted the Opium Law by resolution but taken no steps either to promulgate or publish the law in the Gazette or to make the law otherwise known to the public. “ The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is ”, observed Bose J. in that case, “ abhorrent to civilised man. It shocks his conscience. In the absence, therefore, of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential.”

¹ Douglas Marshall to Mukherjea.

² 1952 S.C.R. 110.

Mr. Justice Douglas concludes by observing that "the concepts embodied in due process are also embodied in Indian Constitutional law, where other clauses do service for due process". It strikes me that the view taken by Mr. Justice Douglas is correct and though we may not have adopted the due process clause it cannot be said that we have escaped its spirit.

Let us turn for a moment to the rights which the Constitution guarantees to citizens and consider for a moment the extent to which they go in protecting individual rights. They are enumerated in Article 19 and they assure rights to (a) freedom of speech and expression, (b) peaceful assembly without arms, (c) form associations and unions, (d) move freely throughout the territory of India, (e) reside or settle in any part of the territory of India, (f) acquire, hold and dispose of property and (g) practise any profession or carry on any occupation, trade or business. The subsequent five clauses of this article make it abundantly plain that these rights are not absolute in the sense that they cannot be restricted at all but are indeed subject to such restrictions or regulations as the State may, in the exercise of its law-making powers, impose in the interests of public order, decency and morality. Further, sub-clause (a) of clause (1) of Article 19 cannot prevent the State from making any law relating to libel, slander, contempt of court or any matter which undermines the security or tends to overthrow the security of the State. The State is further not prevented from making laws restricting some of these rights in the interest of the general public or for the protection of the interests of any Scheduled tribe.

The question may well be asked whether any useful purpose is served by enunciating rights and thereafter making them at the same time subject to restrictions and limitations by the State. The answer to this line of criticism is that the objective permeating this part of the Constitution is to make it clear to the average citizen that he shall be governed not in an arbitrary manner but by the rule of law. Thus these rights were both intended and calculated to add to the security provided for the citizen by the provisions for adult suffrage and an independent judiciary. No doubt the legis-

latures could curtail these rights but they could do so only for one of the reasons enumerated in the various clauses to article 19 and in a case coming up before courts it would be for the courts to decide as to whether the restriction was reasonable or not. In *S. Krishnan and others vs. the State of Madras*¹ Mr. Justice Bose in his minority judgment expresses the opinion that the people of India entrusted to Parliament "which represents their will, the duty of satisfying itself that any limitations hereafter to be placed on the freedoms conferred are necessary and essential and that these limitations will not exceed such limits as Parliament itself shall determine solemnly and deliberately, after anxious scrutiny and dutiful care." "I cannot," says Bose J. "bring myself to believe that the framers of our Constitution intended that the liberties guaranteed should be illusory and meaningless or that they could be toyed with by this person or that. They did not bestow on the people of India a cold, lifeless, inert mass of malleable clay but created a living organism, breathed life into it and endowed it with purpose and vigour so that it should grow healthily and sturdily in the democratic way of life, which is the free way. In the circumstances, I prefer to decide in favour of the freedom of the subject." The conclusion at which he arrived is that the stress in the Constitution is throughout on the freedoms conferred and that the limitations placed on them are but 'regrettable necessities.' Unquestionably the founding fathers did not intend the fundamental rights conceded by them to be a mere eye-wash. They were not perpetrating a fraud upon the people of this country but in estimating the extent to which these liberties can go neither the conditions for which they were providing nor the social, economic and political thought of the age in which the founding fathers had been brought up and nurtured can be entirely overlooked. It is true that in the Constitution of the United States there are no clauses qualifying these rights; but in its actual working even these courts have by inventing the doctrine of 'police power' laid down restrictions upon them in the interest of public order, public morality, public health and

¹ 1951 S.O.R. 621 at 646.

prevention of people from crimes. In Britain though there is no Bill of Rights such as is to be found in the U.S.A. Constitution individuals in fact enjoy vast liberties. Britain truly is a land of liberty. Yet even there these liberties are subject to laws of sedition, blasphemy, contempt, libel and slander which courts administer. In war time and emergencies Parliament has been known to enact laws restrictive of the rights of a subject to the extent of providing for preventive detention. In *Liversidge vs. Anderson*¹ the House of Lords went in upholding a preventive detention law to the extent of approving not only that the rule where the legislation involved restricts the liberty of the subject in war time the legislation should, if possible, be construed in favour of the subject, has no relevance but also that the words 'has reasonable cause to believe' mean reasonable satisfaction of the minister concerned. There are no absolute freedoms in any country, democratic or otherwise. To confer rights unregulated by laws would not indeed be to promote liberty but anarchy and chaos. The situation existing in the country had to be taken notice of in framing the Constitution. Perforce our Constitution-makers had to think in a realistic manner of conditions, political, social and economic as they were and were likely to be for some years in our land.

In our struggle for achieving our independence, we had to amputate a part of our body in order that secular democracy might function under conditions which would make for its success. The partition which accompanied our independence had led to much bloodshed, arson and looting. It had left bitter memories behind. For centuries a section of our population had been living under intolerable social and economic conditions. There were groups in our country who were not prepared to view the problems which a new State had to tackle with realism. In attaining our objective of an integrated India we had to liquidate 562 States of varying sizes spread over the entire country. That this process of the integration of the States with those known as British Indian provinces was accomplished with the good

¹ 1942 A.C. 206.

3-1980 B.

will of both the Princes and the people of the States is something which redounds to our credit. Apart from all this, our laws of land tenure were of an antiquated character reminiscent of feudalism. Actual experience had taught us that property in this country even perhaps more than in other lands vests power in the hands of individuals and groups to regulate the lives of one's fellow men. In this after-war tense atmosphere of social unrest and economy our Constitution-makers cannot be blamed for recognising as part of the fundamental law of the land the right of the State to legislate for preventive detention, the provision for which is to be found in Article 22 of the Constitution. I do not think that the Constitution-makers could have looked upon preventive detention as something which they liked. They submitted to the inevitable necessity of it and regretfully in order to make the power more effective they had to amend the Constitution. It must be noted that action taken under laws providing for preventive detention continues to remain, though it may be in a limited sense, subject to the control of courts. The judiciary has to discharge no more sacred function than that of ensuring, by the use of *Habeas Corpus* where necessary, that a citizen's liberty is not invaded except in accordance with the laws and the Constitution of the country. The right of free movement in many ways is bound up with that of personal freedom and that is also the case with the right of freedom of speech, association and assembly.

The right of free speech, association and assembly are cherished in all democratic countries as essential for enabling individuals to live their inner life and expressing their personality. The idea of democracy is firmly rooted in our Constitution and Constitution-makers had no doubt in their minds that society would suffer greatly if individuals were not allowed to discuss things and ventilate their views freely and persuade their fellow men by speech and writing and such other means in our age; as the radio, the television, the cinema, the theatre and the press to their way of thinking. The right of free opinion is the right to influence the opinion of others. For arriving at the truth a free competition of ideas is essential. Where there is a complete denial of that

right, intellectual and moral progress is bound to suffer. All this does not of course mean that the rights are of an unqualified nature. No State can allow itself to be subverted. No individual can arrogate to himself the right to say or do what he pleases without regard to the feelings of his fellow-beings. That the State has, therefore, the right and duty to restrict or regulate them cannot be denied. Our Constitution-makers have abridged these rights by not only allowing such laws as may be necessary to be passed for controlling sedition, libel, slander, defamation and contempt but also by permitting legislation for preventive as distinguished from punitive detention. The legality or propriety of an arrest under the law made for preventive detention can, however, be challenged in our superior courts by applications for *Habeas Corpus* but the degree of protection or relief which the court can give in a case of *Habeas Corpus* is of a limited character. It can examine the validity of the law under which the order is made. But it will not, for example, allow, as was laid down by the Supreme Court in the case of *Romesh Thappar vs. the State of Madras*,¹ an imposition of free censorship on a journal or newspaper for that is a restriction, as Patanjali Shastri observed, on the liberty of the press which is an essential part of the freedom of speech. The position would seem to be that according to the Supreme Court decisions in *Romesh Thappar vs. the State of Madras*² and *Brij Bhāshān vs. the State of Delhi*,³ while, if a document is seditious, its entry would be prohibited because sedition is a matter which undermines the State, a document which is merely calculated to disturb public tranquillity and affect public safety cannot be prohibited because public disorder and disturbance of public tranquillity are not matters which undermine the security of the State.

The law as laid down by the Supreme Court is that "nothing less than endangering the foundations of the State or threatening its overthrow can justify curtailment of the rights to freedom of speech and expression though the right of peace-

¹ 1950 S.C.R. 594.

² 1950 S.C.R. 594.

³ 1950 S.C.R. 605.

able assembly and association may be restricted in the interest of public order including security of the State.

The power of preventive detention is, however, of a wide character and a preventive detention act or a clause of it cannot be impugned on the ground that it does not provide an objective standard which the courts can insist upon for determining whether the requirements of the law have been complied with or not. It is well known that it is on suspicion that action is taken in preventive detention. Where the authority acts on suspicion, the test has necessarily, so the Supreme Court holds, to be subjective. It is well-nigh impossible to lay down objective tests for determining whether preventive detention in any case is justified or not. But while laying down that the satisfaction required is that of the authority passing the order as to the matters specified in a preventive detention act and cannot be substituted for by the courts of its own, it is open, however, to the detenu to establish that the order was made *mala fide* and constitutes an abuse of power. The onus of establishing lack of good faith is upon the detenu. Courts can further examine the grounds disclosed by government in order to find out if they are relevant to the object of the Act, namely, the prevention of acts prejudicial to the defence of India or the security of the State and maintenance of law and order therein. Courts are, however, not competent to enquire into the truth or otherwise of the facts mentioned as grounds of detention in a communication to the detenu. The establishment of an advisory board machinery has not given to the court a jurisdiction to enquire into the question whether the subjective decision of the authority making the order of detention is right or not. It is obligatory, however, upon government to proceed upon some grounds and where they are lacking, there can obviously be no satisfaction. If the grounds are so vague as to make it virtually impossible for the detenu to make a representation, or where good grounds are mixed up with bad ones a detenu is entitled to an order of release. Where again a long delay in furnishing the grounds has been adequately explained, the order of detention cannot be held to be invalid. It is not necessary that the grounds should be communicated directly to the detenu. It is enough that

they have been communicated through a proper channel to the detenu. Grounds can be furnished to the detenu within a reasonable time, there being no hard and fast rule as to what is a reasonable time. Original grounds of detention cannot be fortified by new or additional grounds. Given preventive detention and on the assumption that even in times of peace the satisfaction must be only of the authority making the order, it will perhaps be admitted that courts have gone as far as they reasonably could be expected to do to provide safeguards against the misuse of the power of preventive detention. I will not, however, conceal from you my strong feeling that it is a power which can be justified, if at all, on the grounds of necessity and that my own inclination is to support the view which was put forward by Lord Atkin in *Liversidge vs. Anderson*.¹

You will have noticed that the Constitution guarantees what may be called the right of association or union. Our social instincts cannot be satisfied without association with our fellow-beings. In every society we come across social, cultural, political, economic, trade and labour organisations. Power to legislate regarding such associations is specifically provided for by Entries 61 of List I, 34 of List II, 21, 22, 26 of List III. The test of reasonableness as laid down by Article 19(4) is that the objectives or activities of the association or union must not conflict with the interest of public order or morality. Obviously a society for the promotion of, say, gambling will not be covered by the protection given by this Article. But it is not, as I read the Article, for the legislature to decide finally as to the reasonableness or otherwise of the association, for any such legislation can be tested in a court of law. A case in point is that of the State of Madras *vs. V. G. Row*.² The question that arose in that case was as to whether under the Criminal Law Amendment Act as amended by the Madras Act of 1950, it was open to government to declare an association unlawful without giving it a reasonable opportunity of answering the charges against it. It was held that the provisions were unconstitutional as they

¹ 1942 A.C. 206.

² 1952 S.C.R. 597.

were in conflict with Article 19(1)(c) read with 19(4), as their effect was to enable government to order forfeiture of the property of even persons other than those of the association declared unlawful by government.

The highest importance must rightly attach to the guarantee of free movement throughout the territory of India. I say this because the objective behind this provision is the development of a sense of common citizenship in this country. Our tragedy throughout our history has been our obsessions with our States and provinces. Even in the matter of appointments to this day we allow ourselves to be influenced far too much by provincial considerations. Attention may be invited to the observations of Patanjali Shastri, C.J., in Gopalan's ¹ case in repelling the argument that the order of preventive detention was invalid as it prevented Mr. Gopalan's free movement. "Reading these provisions together" observed Patanjali Shastri, C.J., "it is reasonably clear that they were designed primarily to emphasise the factual unity of the territory of India to secure the right of a free citizen to move from one place to another in India and to reside and settle in any part of India unhampered by any barriers which narrow-minded provincialism may seek to impose." The meaning of this clause was considered by the Supreme Court in Dr. Khare's case ² and one view which was propounded by a minority of the Court consisting of Mukherji and Mahajan JJ., was that inasmuch as no period had been fixed for the internment and the Act itself under which the order was passed had been placed on the statute book without any period fixed for its lapse, the section authorising the internment was invalid on the ground of unreasonableness. This view was not accepted by a majority of the Court and vigorously refuted by Kania C.J., on the question of reasonableness in an internment case. The observations of Chagla C.J., are however relevant and attention may be drawn to them, "the Constitution has made" observed Chagla C.J., "the courts, the custodians of the fundamental rights of the citizens, and it is in that spirit and in that

¹ 1950 S.C.R. 88.

² 1950 S.C.R. 519.

capacity that the court must look upon the nature of the restriction, and even though the absence of a particular safeguard may not be violation of a fundamental right as such, even so the absence of such a safeguard may result in the restriction not being a reasonable restriction. There is no limit placed upon the power of the court to consider the nature of the restrictions. The court must look upon the restrictions from every point of view. It being the duty of the court to safeguard fundamental rights, the greater is the obligation upon the court to scrutinise the restrictions placed by the legislature as carefully as possible." He further observed that "in order to decide whether a restriction is reasonable or not, the court must look at the nature of the restriction, the manner in which it is imposed, its extent both territorial and temporal, and if after considering all this the court comes to the conclusion that the restriction is unreasonable, then the restriction is not justified and the court will not uphold the restriction." He went on to say that "the court must lean in favour of fundamental rights and must place the restrictions imposed upon the legislature in as narrow an ambit as possible."¹

Let me now invite your attention to Article 14 which guarantees that the State shall not deny to any person equality before the law and equal protection of the laws. The first point to note about the Article is that it applies to both citizens and non-citizens including what may be called juristic persons. It is perhaps not without significance that the chapter on Fundamental Rights begins with an enunciation of the principle of equality as a basic feature of the system of government that the founding fathers were seeking to establish in this country. In the Constitution of the United States the sole expression used is equal protection of the laws. In our Constitution equal emphasis has been placed upon both the concepts which have been embodied in the two expressions used in the Constitution. The emphasis on equality is symbolic of the age in which the constitution was drawn up. It is clear that our founding fathers had been affected by the socialistic thought of the age. For them there was a peculiar

¹ A.I.R. 1960 B. 363 at 366, 367.

magic about the word "equality" for it was that they had found largely denied in the India which they had served. Such indeed is the importance attached to equality that apart from being mentioned in the Preamble, the framers of the Constitution have devoted as many as five Articles, namely, Articles 14, 15, 16, 17 and 18 to the chapter on Fundamental Rights to ensure equality in all its aspects.

Some of these Articles are confined to citizens only and some can be availed of by non-citizens also; but on reading these provisions as a whole, one can see the great importance attached to the principle of equality in the Constitution. Deliberately as it were they chose to lay down in categorical terms that the State they were creating must deny neither equality before the law nor the equal protection, i.e., impartial administration of the laws to all persons residing in this land. The first expression which is borrowed from the Constitution of the Irish Free State has a British flavour. It constitutes as it were one of the incidents of the notion comprehended in the term "Rule of Law". It lays down as a fundamental principle of the Constitution in unqualified terms that there must be no system of special laws governing the relations between government and private citizens and that all alike must be equally subject to the ordinary law of the land administered by the ordinary courts of the republic. In the language of Sir Ivor Jennings¹ equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. This of course cannot mean that the same laws should apply to all persons in the same State.

Professor Dicey contrasting it with the French idea of *Droit Administratif* or administrative law which exists in many countries lays stress on the fact that by the expression "equality before the law" which is one of the features of the rule of law is meant the equal subjection of all "classes to the ordinary law of the land administered by the ordinary law court". Obviously in this sense rule of law excludes the idea of any exemption of officials or officers from the duty of obedience to the law which governs other citizens or from

¹ Ivor Jennings, *Law and Custom*.

the jurisdiction of ordinary courts. There can be nothing with this Article in operation, it may be argued, corresponding to administrative law (*droit administratif* & law) or administrative tribunals.

In many European countries and notably France the officials are considered as a class apart; cases in which they are involved as officials are dealt with not by ordinary courts but by special or more or less official tribunals. Experience of other countries has shown that administrative courts can be as efficient and independent as ordinary courts and some jurists suggest that there is no adequate reason to call them extraordinary merely for the reason that they do not conform to the British model. According to a Full Bench of the Allahabad High Court in *Asiatic Engineering Co. vs. Achhru Ram*¹ the Article does not imply political equality in the sense that every citizen, be he an adult, lunatic or a minor, must be given the vote. What it asserts is that among equals the laws should be equal. What it emphasises is that, to quote the language of the Full Bench, they should be administered with equal fairness and that like should be treated alike. What it, in other words, seeks to ensure is that the right to sue and be sued, to prosecute and be prosecuted for the same kind of action shall be the same for all citizens and that distinctions of race, religion, wealth, social status, or political influence shall not make any difference in those rights. In short, the first part of the Article is as Patanjali Shastri, C.J., in the *State of West Bengal vs. A. A. Sarkar*² puts it a declaration of the equality of the civil rights of all persons within the territory of India and thus enshrines what American Judges regard as a basic principle of republicanism.

I come now to the equal protection clause. The clause is similar to that which was inserted in the U.S. Constitution by the 14th Amendment and the intention behind it appears to have been to help the people of the Negro races and the amendment was made applicable to only State legislature. Now on a superficial view it can be argued that the guarantee assured by this clause requires absolute uniformity in the

¹ 1951 A.L.J.R. 576.

² 1952 S.C.B. 284.

treatment of all classes but this is far from being the case. The view of U.S.A. courts is that a considerable degree of variation permitting classification not arbitrarily unfair or based on unwarranted discrimination is permissible. The fact appears to be that courts do not regard laws which treat one class of people in a different manner from others as being opposed to this article if a reasonable basis of classification exists. The clause does not require that every person in the land shall be possessed of the same rights and privileges but it does demand that the classification must be made upon a reasonable ground and not be a mere arbitrary selection. It further requires that the law shall be impartially administered. For this reason a majority of the Supreme Court declared certain sections of the West Bengal Special Courts Act, 1950, invalid for it had provided for, without any adequate reason, a procedure for the trial of the accused in certain cases and for certain offences which was different from others. Again, in another case, a law providing for separate electorates by members of religious communities was held invalid as being inconsistent with Article 15(1) which disallows discrimination in the matter of rights, privileges or immunities pertaining to a citizen as a citizen.¹ In the latest case of *T. K. Mudaliar vs. Venkatachalam* ² the law as declared to be settled by the Supreme Court is that the classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. But what is vital is that there must be a nexus between the basis of classification and the object of the Act under consideration. Not only discrimination in matters of substantive law but also procedural discrimination is condemned by Article 14. It is further important to point out that the phrase makes it obligatory on the State to be impartial in the administration of its laws. In fact, a law which cannot in its very nature be administered impartially as between persons of the same class, would be invalid under the Constitution. In the application of the principles enunciated above to the facts of a particular case courts have to consider, as Bhagwati J.

¹ Nain Sukh Das and another vs. the State of U.P. and others—1953 S.O.R. 1184.

² (1955) 2 S.C.R. 1196.

observes "the terms of the impugned legislation having regard to the background and surrounding circumstances so far as it may be necessary to do so in order to arrive at a conclusion whether it infringes the fundamental right in question."

Clauses (f) and (g) of Article 19 have a reference to a different class of rights. In clause (g) the right to earn a livelihood is guaranteed, and it is proposed to deal with it a little later. I propose to consider the right of property first. Perhaps a reason for lumping up in the same Article the rights of property with those of what might be called basic liberties is that the Constitution-makers felt that it was necessary to take a unified and not a separate view of the rights pertaining to an individual. Nevertheless, rights of property cannot be equated either with basic human liberties or with the right to economic security which is fundamental for the good life. After all, the right of property is an instrument of power which, in the ultimate analysis, means the power to control the economic life of others. Power tends to corrupt both those who wield it and those who are subject to it. Whereas other liberties can be enjoyed by all citizens, the right of property in the long history of civilization has remained the monopoly of only a section of the population.

The point that I would like therefore to drive home is that it was inevitable that in dealing with this right the founding fathers should have attached greater importance to social well-being than to individual rights of ownership. Consequently in Article 31 of the Constitution as originally drafted a distinction was made between what may be called feudal rights of property and other rights attached to it and courts were not given jurisdiction to determine the compensation payable for zamindari abolition. Unfortunately this provision led to much litigation. Apart from this, questions also arose regarding compensation for properties, including business enterprises, taken over for public purposes. Some of the Acts passed by various legislatures in this regard were declared either wholly or in part invalid by courts including the Supreme Court. To meet this situation the Constitution was amended in accordance with the procedure laid down for it.

The existing position is that courts have no jurisdiction to go into the question of the adequacy or otherwise of the compensation fixed by the legislature or by the State in accordance with the principles laid down under the law. But the personal properties of the individuals enjoy protection under the Constitution and the State is under a constitutional obligation to give adequate compensation when depriving an individual of any property other than zamindari property or property in the nature of public enterprises taken over by the State for public purposes.

Very different from the right to hold, acquire or dispose of property is that of the one relating to the carrying on of one's profession, trade or business contemplated by Article 19(9). On any reasoning the individual is entitled to a full opportunity to choose his profession, business or trade and to carry it on for the purposes of a living. A proper balance has to be struck, as observed by Mukherji J., in *Messrs. Dwarka Prasad Lakshmi Narain vs. the State of U.P. and others*¹ between the freedom guaranteed under Article 19(1)(g) and the social control permitted by clause (6) of Article 19. The position as settled by the Supreme Court is that a law or order conferring arbitrary or uncontrolled power upon licensing officers to grant or withhold licenses for regulating trade or business in normally available commodities is invalid on the ground of unreasonableness. Clearly the freedom guaranteed by Article 19(1)(g) is subject to the social control permitted by clause (6) of Article 19. Obviously legislation which vests arbitrary or excessive power in the hands of licensing officers without check or control by any higher authority cannot but be held to be one which contravenes the provisions of Article 19(1)(g).

The loss to a man of his business can be a very serious matter. If the power to cancel licenses which are deemed essential is unreasonably withheld for carrying on business, and if grounds other than those which the licensing authority can take into account influence his decision, the very purpose of the Constitution which is the establishment of a welfare State can be frustrated, for a license cannot be looked upon as a

¹ 1954 S.C.R. 803.

mere privilege to be granted, revoked or withheld at the licensor's discretion. There is an Allahabad authority for this decision (*vide* Rameswar Prasad Kedar Nath *vs.* District Magistrate).¹

Three other guarantees that may be noticed shortly are those enumerated in Article 20. The roots of the rule enshrined in Article 20(2) are to be found in the well-established rule of the common law of England that where a person has been convicted of an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings in the same offence.² I may further point out that no person can be convicted of an act which was not an offence at the time of its commission. The punitive law must be one factually in force at the time of the commission of the penal act. It is not open to the State to punish an accused person by relying upon a law not actually existing but made retrospectively operative at the time of the commission of the penal act.³ Further no person can be compelled to give testimony against himself. The Supreme Court held in the case of M. P. Sharma and others *vs.* Satish Chandra and others⁴ that the guarantee in Article 20(3) extends also to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against the accused. It has further been held in this case that the guarantee does not extend to search and seizures.

What in fact the Constitution by this Article has done is to elevate to the level of an ethical principle the rule laid down regarding acquittal as a bar to further proceedings in S. 493 Cr. P. Code. The rule has a limited scope. Thus a person who has been punished departmentally can be proceeded against criminally.

I come now to another right, that of free worship. Ours is a country of many faiths. We take pride in the fact that to the main stream of Indian culture many creeds and religions

¹ A.I.R. 1954, Allahabad, 144.

² *Moqbool Hussain vs. the State of Bombay*, 1953 S.C.R. 780

³ *Rao Shiva Bahadur Singh and another vs. the State of Vindhya Pradesh*, 1953 S.C.R. 1188.

⁴ 1954 S.C.R. 1077.

have contributed. No doubt the State we live in is a secular one. But a secular State does not mean a State that is indifferent to moral and spiritual values. Article 25 of the Constitution concedes to every individual not only freedom of conscience but also the right to make manifest his belief. In simple language while observing strict neutrality in the matter of religion our Constitution permits an individual or groups of individuals to propagate, preach or disseminate his or their ideas for the benefit of others. Our Constitution makes no distinction among religions. It adopts an attitude of strict impartiality towards all of them and makes it incumbent on the State not to show any special favour to any particular religion.

Our Constitution while looking upon religion as a personal affair of the individuals and while conceding to them the right to manage their religious affairs and charities, however, reserves to the State the right to regulate those rights in the interests of public order, morality and health.

Here again State interference cannot be of an unrestricted character. In the case of *Ratilal Tarachand Gandhi vs. the State of Bombay and others*¹ the S. C. invalidated certain sections of the Bombay Public Trusts Act, 1950 for violation of the rights guaranteed by Articles 25 and 26. The court held that the provisions of the Act empowering a court to appoint the charity commissioner as the trustee of a religious trust was void. The court further held that the section empowering the diversion of trust funds or property "for purposes which the charity commissioner or the court considers expedient or proper, although the original objects of the founder can still be carried out, was an unwarrantable encroachment on the freedom of religious institutions in regard to the management of their religious affairs. This case extends the right of a religious sect or denomination to manage its own affairs in matters of religion to the right to spend the trust funds or property for religious purposes indicated by the founder of the trust or established by usage obtaining in a particular institution.

• 1 1954 S.C.R. 1055 at 1071. •

Clearly where a religious denomination in managing its religious affairs deprives a member of his legal rights courts will interfere.

It may also be mentioned that it is not permissible to compel any person to pay any tax for the advancement of any particular religion. Religious education cannot be imparted in institutions maintained solely by the State, and though it is permissible for religious denominations to run their educational institutions and receive financial assistance for doing so from the State, they cannot impart religious education compulsorily to those who, if adults, are unwilling to receive it, and whose parents, if they happen to be minors, object to it. Where, of course, an institution is not in receipt of help from the State, it is open to it to make its own rules, *i.e.*, it is at liberty to make religious education compulsory.

LECTURE III

Role of Courts

I shall now invite your attention to the role of the Courts in upholding fundamental rights. Legal remedies have been provided for the enforcement of fundamental rights shown to have been infringed or threatened to be infringed. Article 32 of the Constitution confers a right on a person who has a grievance that a fundamental right of his has been violated to move the Supreme Court directly for its enforcement. If the Supreme Court comes to the conclusion that there has been a violation of it or that there is reason to apprehend that there will be a violation of a fundamental right, it can and is indeed under a constitutional obligation to issue the appropriate writ, order or direction needed for relief in the case before it. It must be noted that the terms of the Article limit its power to issue writs, orders or infringement, when directly moved, to cases which involve questions of the infringement of fundamental rights only.¹ Article 226 is wider in scope and authorises the High Court throughout the territories in relation to which it exercises jurisdiction to issue writs, orders or direction with those territories even in cases where no infringement of a fundamental right is alleged. For the words "for any other purpose" are of wide import and they enable the courts not only to issue the well-known writs mentioned in the Article but also to pass any order or direction for the defence or protection or enforcement of other rights as well. Of course the words "for any other purpose" cannot and do not mean every conceivable case of moral rights. They do not include a case of a tort or a crime or a contract. They cannot, for example, be issued to prohibit private companies or corporations such as the Election Sub-Committee of the All-India Congress Committee from holding elections contrary to the rules of their body. They are not intended to provide a substitute for ordinary

¹ *Ramjilal vs. Income-Tax Officer, Mohindargarh*, 1951 S.C.B. 127.

litigation for the remedy is of an extraordinary nature and cases are decided on agreed facts deposed to in affidavits filed by the parties to the case. They are intended to protect the citizen against the infringement of his fundamental and legal right in cases where it is clearly desirable in the public interest that the court should intervene either because the defendant was under a legal duty to do or a judicial or quasi-judicial or even for that matter an administrative Tribunal bound to act judicially has acted in excess of its jurisdiction or has violated some principle of natural justice or has committed a grave error of procedure in arriving at its decision. The purpose behind the Article is to provide judicial control of the acts of not only subordinate judicial bodies but also of those committed by administrative bodies where they are under an obligation to act judicially or to do or repair from doing something in law. "We think it right to point out what is sometimes overlooked", observed Patanjali Sastri J., in the State of Madras *vs.* V. G. Row"¹ "that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of review of legislative acts under cover of the widely interpreted due process clause in the 5th and the 14th amendments " This is specially true as regards the fundamental rights as to which this court has been assigned the role of a sentinel on the '*qui vive*'."

In the Sholapur Mills case Mahajan J., observed that the view expressed by Das J., in the case of Charanjit Lal Choudry², that Article 32 can only be invoked for the purpose of an enforcement of fundamental rights was correct and that Article does not permit an application for agitating the competence of the appropriate legislature in passing any particular enactment unless the enactment infringes any of the fundamental rights as well. Thus, it is clear that whereas Article 32 has only a limited scope, Article 226 concedes wider powers to a High Court having jurisdiction in the matter but in the exercise of these powers the High

¹ 1952 S.C.R. 597.

² 1954 S.C.J. p. 29.

Court is of course subject to the appellate jurisdiction of the Supreme Court.

Now nowhere in the Constitution has the meaning or the scope of the writs mentioned therein, *viz.*, *Habeas Corpus*, *Prohibition*, *Certiorari*, *Mandamus* and *Quo Warranto* been defined. Their meaning has, therefore, to be gathered from that which attaches to them under the English Common Law for it is from that source that the concept of these writs has been derived. As I have already pointed out the wide language of Article 226 enables the validity of a law or order to be tested in the High Court having jurisdiction in the matter or where a fundamental right is invoked in the Supreme Court direct. Obviously having regard to the vast powers with which the Courts have been vested it is, as has been emphasized in case after case, incumbent on them to be circumspect in issuing writs, orders or directions, whether of a final or interlocutory nature. The Constitution has vested in them the authority, on a petition presented by a party aggrieved to review, as it were, acts of even administrative authorities where their decision is not based upon those imponderables which a court has no means of testing for itself but on objective tests to be arrived at in accordance with the procedure laid down in the impugned statute or principles of natural justice.

Let me comment very briefly on the meaning and nature of the five prerogative writs to which reference has been made by the Constitution.

The first of them, *Habeas Corpus*, has a long history into which it will not be possible for me to enter. Literally "*Habeas Corpus*" means "produce the body" and the writ is called by this name for it is in the nature of a command to the officer or person detaining the person by whom or on whose behalf the petition is presented to bring his body before the court on a certain day and at a certain place and time so that the court may enquire into the legality or propriety of the arrest and issue orders of either immediate release or speedy trial. The principle of this writ had found a place in the powers exercisable by our Presidency High Courts as also in Section 49¹ of the Code of Criminal Procedure which

1 1951 S.C.R. 844.

enables a High Court to direct the release of any person illegally or improperly detained in public or private custody. In a *Habeas Corpus* all that the courts can enquire into is as to whether the detention or arrest is legal or improper. Where, for example, it appears that the detention is in execution of a sentence or indictment on a criminal charge or under a preventive detention law not open to any question on the ground of validity, the court has no option but to refuse the writ. The Supreme Court has in *Janardan Reddy vs. the State of Hyderabad*¹ viz., gone to the extent of holding that even on the assumption that the trial court acted without jurisdiction in passing a sentence of detention, it will not interfere with the order if the appellate court which considered the case on appeal was fully competent to decide whether the sentence was or was not without jurisdiction. The satisfaction required in the case of preventive detention is that of the authority ordering it and consequently it is only where that authority can be shown to have acted in a *mala fide* manner by not exercising its mind at all or by disregarding some essential procedure laid down for the passing of the order that the court can help the detenu by an order of release.

I shall now come to the writ of *Mandamus*. It originated as a high prerogative writ issued in the nature of a command by the King's Bench Division of the High Court of London directing any person, corporation or court of inferior jurisdiction to do something which it was under a legal or statutory obligation to do. The issue of this writ is entirely a matter of discretion with the court. Normally it is not issued when the petitioner has an equally efficacious, beneficial and speedy alternative remedy. In considering the question of the suitability or otherwise of issuing the writ our courts do not act as courts of appeal for it is not their function to substitute their wisdom and discretion for that of the persons to whom the matter has been entrusted by law. It can be refused where, for example, a court of equity would be justified in exercising a discretion to refuse to come to the help of the petitioner by its issue. It is important to remember that in the language of Lord Goddard, *Mandamus* "is neither a writ of course nor a writ of right but that it

¹ 1951 S.C.R. 844.

will be granted if the duty is of a public nature provided there is no more appropriate remedy." It has been emphasised by courts that it should be sparingly used and more particularly so only in those clear cases where the person whose rights have been seriously infringed has no adequate and efficacious remedy available to him. [See on this point *Asiatic Engineering Company vs. Shri Achhru Ram.*]¹

The writ of *Prohibition* is intended to restrain courts of inferior jurisdiction from going beyond their powers. It cannot be, however, issued to a legislative body from continuing its deliberations. Though both *Prohibition* and *Certiorari* form part of the process by which a superior court restrains courts of inferior jurisdiction from exceeding their jurisdiction, the two writs are issued at different stages of a proceeding. While, for example, a writ of *prohibition* is issued by a superior court forbidding the inferior court from continuing the proceedings during their pendency, a writ of *certiorari* can be issued only after they have been terminated by a final decision. It may be further pointed out that while by a writ in the nature of *certiorari* the High Court can merely annul a decision, it can, acting in its supervisory capacity under Article 227 of the Constitution, not only quash the order but also substitute for it another. It is to be noted that both writs deal with questions of excessive jurisdiction and their operation is intended to control and does control the proceedings of bodies which do not claim to be or would not be recognised as courts of justice. The writ lies as a matter of right though not as a matter of course.

Certiorari originated as a writ issued by the Chancery or the King's Bench Division requiring an inferior Tribunal or court to submit its proceedings so that it may more properly investigate the matter. The scope of this writ is indicated in the classic observation of Atkin, L. J. in the case of *R. vs. Electricity Commissioners.*² *Certiorari* cannot be used for purposes of reviewing any purely administrative act. It is available only for purposes of relief from the judicial acts of inferior courts or quasi-judicial Tribunals or even administrative authorities where they are required to act in

¹ 1961 A.Z.J.B. 576.

² (1924) 1 K.B. 171 at 205.

judicial manner. Where, for example, an authority required to act judicially contravenes some principles of natural justice or commits a grave error in procedure which vitiates its findings, the court will issue the writ. Where again a court usurps a jurisdiction not vested in it by law, the remedy under this writ will be available. The question whether a writ of *certiorari* can be issued where there is an error of law apparent on the face of the record has now been set at rest by the Supreme Court in *T. C. Basappa vs. T. Nagappa*.¹ That court has held that an error of law apparent on the face of the record if it could be shown to have affected the decision of the case would make *certiorari* available. This is in accordance with the principles laid down by the Court of Appeal in the Northumberland case (*Appeals Tribunal* 1952 page 122 All England Reports.)

The object of a writ of *Quo Warranto* which again is of ancient origin is different. *Quo Warranto*, shortly put, is in the nature of an order or injunction restraining a person from claiming or usurping any office franchise liberty or privilege of a public nature. The objective behind the writ is to ensure that a public office or franchise shall not be usurped by a person not lawfully entitled or elected to it. In *R. vs. Speyer*² it was decided that even a stranger is entitled to maintain a *quo-warranto* petition. The Allahabad, Calcutta and Nagpur High Courts accept that view as correct but the view of the Madras High Court is not, however, so very clear on this point.

You will have gathered from what I have said what the meaning attached in English Law is to the five prerogative writs which have been mentioned in the Constitution. That is the meaning which Indian Courts also have attached to them. The reason for that is obvious. Courts were entitled to assume that the Constitution-makers knew their English Law well and intended that these writs should be interpreted with reference to the meaning given to them by English Courts. They, did not, however, restrict the authority of the High Court to the issue of these prerogative writs only.

¹ (1955) 1 S.C.R. 250.

² (1916) 1 K.B. 595 at 613.

The Constitution-makers went a little further and authorised the courts to issue directions or orders which one may reasonably assume they intended should bear some resemblance to the writs that they had enumerated. The writ powers of the High Courts are thus of a supremely important character.

By their proper use our courts can exercise what may be called a supervisory jurisdiction over all judicial or quasi-judicial acts done or purported to be done by judicial or quasi-judicial, and even administrative Tribunals including in appropriate cases even Government departments. Courts are not bound to look back into the history or the procedural technicalities of these writs in English Law nor, of course, is it obligatory on them to feel themselves bound by decisions of English Courts or opinions of English Judges or of American Judges in the interpretation of the powers which these writs have placed in their hands.¹ Clearly where the matter is one which lies within the jurisdiction of an inferior court or tribunal with judicial or quasi-judicial powers, the fact that it has come to an erroneous conclusion, provided it is one in respect of a matter which is within its jurisdiction and there is nothing of a collateral nature which could be said to have effected the error would not justify interference by courts. An error of law apparent on the face of the record would, however, entitle it to interfere. The issue of writs, directions, or orders under Article 226 being a purely discretionary matter under Article 226 no person has a right to any writ, direction, or order as a matter of course. To say that the power is of a discretionary character is not, however, to assert that it has not to be exercised according to judicial principles. The orders, directions or writs under Article 226 and only in cases where fundamental rights are infringed under Article 32 by the Supreme Court can be issued not only to judicial bodies but also to administrative bodies when acting in a judicial or quasi-judicial capacity. Thus when an authority has failed to decide a matter which it was incumbent on it to decide, *mandamus* may be properly issued.

Controversy has, however, raged round the question as to what constitutes a judicial or quasi-judicial act of an

• ¹ (1955) 1 S.C.R. 250 at 256. •

administrative body or authority or government which can be the subject-matter of a writ of *certiorari* or *prohibition*. The test for determining whether the act impugned of the administrative body is a judicial act or not is whether in deciding it it was merely concerned with imponderables which are incapable of being tested in courts of law or whether it had to decide the matter upon material which were capable of objective tests. Where an authority acts on matters on which it has to form a subjective opinion after taking into consideration matters of a purely administrative character, the order cannot be the subject-matter of litigation in a court of law. There are many administrative matters, however, which require for their final decision a consideration of pros and cons, or in other words, a judicial approach. They are clearly subject to the supervisory control of the courts.

Attention may be invited to the following observations on the point just mentioned of Mukherji J., in this connection. "Questions may and do arise" observes that learned Judge, "where a quasi-judicial body attempts to usurp a jurisdiction which it does not possess." It may assume jurisdiction properly by adopting extraneous or irrelevant considerations, or there may be cases where in its proceedings the Tribunal violates principles of natural justice. In all such cases the most adequate remedy would be a writ of *certiorari* or *prohibition*. The object of these writs, he points out, is simply to confine the powers of these quasi-judicial Tribunals within the limits of the jurisdiction assigned to them by law and to restrain them from acting in excess of their jurisdiction. The law as the Supreme Court has laid down is that the mere fact that an executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of the power conferred on it is not enough to invest the decision it makes with a quasi-judicial character. The real test according to Das J., in *Province of Bombay vs. Kushal Das*,¹ which distinguishes a quasi-judicial act from an administrative act is the duty to act judicially. It follows from this that for determining whether a particular statutory

¹ A.I.R. 1950 S.C. 257.

authority is a quasi-judicial body or a mere administrative body the real question which has to be considered is whether the statutory body had the duty to act judicially.

Kania C.J. in the same case pointed out that the true position is that once the law under which the authority is making a decision itself requires a judicial approach, the decision will be quasi-judicial.

I have pointed out in a very superficial manner how extensive the powers which have been given both to the High Courts, and the Supreme Court under Article 32 which merely concerns itself with fundamental rights are. They do not by any means exhaust all the powers of a constitutional character which the courts possess. These powers include, for example, the obligation whenever the High Court thinks that a case pending before a lower court involves a question of constitutional law to either dispose of the case, itself, or determine the question of law and return the case to the court below with directions to decide it according to the law decided by it on the point. Further apart from the appellate powers with which it has been vested, the Supreme Court has been given the power of granting special leave from any order, sentence, judgment, decree, determination of any court or tribunal of the country. Further, the President has been given the right to refer any question of law or fact of public importance to the Supreme Court and on such a reference the Supreme Court is bound to give its opinion. In the case of *Charanjit Lal vs. Union of India*,¹ Mukherji, J. in considering the scope of Article 32 made the observation that that article "is not concerned directly with the determination of the constitutional validity of particular legislative enactments. What it aims at is the enforcing of fundamental rights guaranteed by the Constitution no matter whether the enforcement of such rights arises out of the action of the executive or of the legislature. To make out a case under this article, it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competence of the particular legislature as not being covered by any of the legislative lists but that it affects or invades his fundamental rights guaranteed by the

¹ A.I.R. 1951 8 C.B. 41

Constitution of which he could seek enforcement by an appropriate writ or orders. The rights that could be enforced under Article 32 must ordinarily be the rights of the petitioner himself who complains of such rights and approaches the court for reliefs." He further added that "the presumption is in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a violation of constitutional principles." He further added that "proceedings under Article 32 cannot really have any affinity to what is known as declaratory suit. For the article is not meant to grant declaratory reliefs."

You will see from what I have said how pivotal is the role which has been assigned to our courts and in particular the Supreme Court.

In *Dwarkadas Shrinivas of Bombay vs. the Sholapur Spinning and Weaving Company Ltd.*¹ which was a case of deprivation of the property of a joint stock company within the meaning of Article 31 of the Constitution, the principle was laid down or the proposition was enunciated by Mahajan J. that in the determination of cases where there has been any over-stepping of the limits of social legislation, no abstract standard or general rule can be laid down and the question is really one of urgency and hence its determination depends upon the facts of each case. According to Bose J. the Constitution is an enduring document intended to meet the "altering conditions of a changing world with its shifting emphasis and differing needs". He also recommends the case-method in the resolution of constitutional controversies. In *State of West Bengal vs. Anwar Ali Sirkar*² he observed, "I feel therefore that in each case Judges must look straight into the heart of things to regard to the facts of each case concretely much as a Jury would do;" In this very case he made resort to the historical method of deciding constitutional cases.

Reference has been made to the articles which prohibit discrimination and to the fact of the limitation or restrictions which can be imposed by legislation upon the fundamental rights guaranteed under Article 19 of the Constitution.

¹ 1954 S.C.R. 674.

² 1952 S.C.R. 264 at 363.

The point I wish to make is that it is for Judges to interpret what is reasonable, rational or arbitrary or discriminatory. This is something inescapable. It is for Judges to crystalise a generality like the word reasonableness into a concrete reality. This does not, however, mean that Judges are free to determine according to their economic or social predilections or personal opinions what is for the benefit for the people or not. There are limits beyond which they may not go for it is incumbent on them to allow the legislatures the widest latitude to exercise their law-making functions. The Constitution cannot be interpreted in a lifeless manner rigidly according to the principles of the General Clauses Act or the Interpretation Act without any regard to the background which led the legislature to pass a particular law. Neither the history nor the time in which it was framed can be ignored or obliterated from the judicial mind in forming a judgment as to its reasonableness or discriminating character. The virtue of a Constitution consists in the elasticity it possesses to suit the exigencies of not only today but of tomorrow and day after tomorrow. There is and there can, therefore, be no absolute test of reasonableness valid for all times. Situations in life change. Each decade and each generation has its own problems. Indeed even situations in a year are never the same. The claims of social control have in each case to be reconciled with those of the individual freedoms granted by the Constitution and all this requires a clear comprehension of the social forces in operation in the community. In some cases even the history of our freedom struggle and the thought and opinions which must have been shaping our Constitution-makers may have to be remembered and taken into account. The Judge as it were in considering these questions has to form a correct estimate of what might be called the collective conscience of the community. He has to avoid the two extreme dangers of interfering unreasonably with the declared will of the legislators and of ignoring where he must not do so, the propriety of the legislation passed by them even when that legislature is shown to have interfered with in a highly arbitrary manner quite inconsistent with the constitutional rights of individuals affected by the legislation. The task of interpretation in a modern community

which has been cast upon our courts is not, in the circumstances of today, an easy one. By straining the law too much in favour of one or the other party and allowing their prejudices to influence their judgment, judges can undermine the very foundations of the Constitution they have been called upon to uphold. There is no universal standard of reasonableness or discrimination which can be derived from absolute principles of *a priori* reasoning and which can be universally applied to each individual statute impugned. They have to take into consideration as Patanjali C.J. points out in the case of the State of Madras *vs.* V. G. Row ¹ "the nature of the right alleged to have been infringed, the underlying purpose of the legislation imposed the extent and urgency of the evil sought to be remedied and the prevailing conditions of the time."

I have quoted these observations to emphasise the responsibility attaching to a Judge's office in discharging his task of interpreting those constitutional guarantees upon which the limits of State's powers in relation to the individual depend. Occasionally our statutes are so framed as to lay down certain general principles and leave the details or particulars to be filled in by Government departments by rules framed by them. In these cases questions often arise as to whether the rule was within the ambit of the authority promulgating it. There is, in our Constitution, no such separation of powers as marks the U.S.A. Constitution. The principle underlying that Constitution is that of checks and balances. Each department of government is supposed to be independent of the other. To Congress has been assigned the task of law-making. This power it cannot delegate, so it has been held by U.S.A. Courts,—after much controversy and litigation, without canalizing within defined limits that power. Here in our country the principles on which the relationship of the Executive to the legislature depends are different. The Ministry is appointed by the President on the advice of the Prime Minister, who has to have a majority in the House of the People to support him. This system of responsible government obtains both at the Centre and in the States where the first minister is called the Chief Minister.

• 1 1952 S.C.R. 597.

While there is a vesting of the executive power under Articles 73 and 154 in the President or the Governor as the case may be, there are in our Constitution no vesting clauses with regard to the legislature or the judiciary. The Indian Parliament is competent according to a majority view of the Supreme Court to delegate its powers to subordinate authorities provided it does not by so doing efface itself completely. The one effective safeguard that citizens, therefore, have under our Constitution against the improper exercise of delegated legislation is at election time. By learning how to vote intelligently they can make Governments who abuse their powers at elections answerable by refusing their confidence in them. Nevertheless, questions sometimes do arise whether particular laws or orders or regulations or rules affecting individual rights are or are not within the competence of the authority promulgating them. I am mentioning all this in order to bring home to you that a Judge's task in this class of case in a modern community is by no means an easy one.

In interpreting a Constitution a Judge's foremost duty is not to forget Marshall's famous phrase, that it is a constitution he is expounding. Commenting on the above remarks of Marshall that great American Judge Cardozo observes: "A constitutional statute ought to state not rules for the passing hour but principles for an expanding future. Precedents are good but only up to a point. The meaning of a statute cannot remain the same for all times." It is a mistake to assume that there can be an exclusively correct interpretation, as Judge Cardozo puts it *i.e.*, one which would be the true meaning of the statute from the beginning to the end of the day. Time changes, circumstances change; the ideas which permeate a society are in a state of constant flux. Courts, therefore, have to keep themselves abreast of the social thought of the age. Let me illustrate what I have in mind by a reference to the interpretation of the words 'public use'. At one time in interpreting statutes relating to property affected with a public purpose there was a tendency on the part of courts to emphasise the rights of the individual to the exclusion of society. The circumstances of those days justified that being done. But in our time we know that

there is a social purpose in property which cannot be ignored and therefore the meaning of public use or public policy has expanded. Take the question again of the rights of women in a modern community. In days gone by the social conscience thought nothing wrong about assigning to women a definitely inferior place in society. Courts which refuse to take notice of the changed social opinion regarding a matter like that when fixing, say, the quantum of maintenance, will be ignoring something important and vital in so far as by Judge-made law they will be laying down a rule which will not be in conformity with our directive principles. Similarly, in the case of a Constitution time brings into play new forces which could have only been dimly, if at all, foreseen by the framers. A textual interpretation based on a too grammatical interpretation of the Constitution which takes no account of the meaning to be attached to particular words in the context of our present social life would make a Constitution far too rigid and inelastic for the requirements of a world pulsating with new ideas in an age of planning. Obviously, the correct course for courts is to keep themselves abreast of social thought and the advances made in it for it is only by so doing that they will be able to give life and meaning to the Constitution and make it a true instrument of progress. Even after making allowance for the fact that in determining whether a particular restriction on any of the freedoms mentioned in the Constitution is reasonable or not, judges have at best a limited function in so far as they must start with a presumption of reasonableness on the part of the legislature. While they cannot substitute in every case their own judgment for that of the supreme sovereign body in the country, they cannot, under the Constitution, as it exists, entirely abdicate their function of arriving at their own conclusions. That their judgment is susceptible of being unconsciously influenced by their upbringing and training is a familiar theme with advanced thinkers but I think no one has ever denied that they endeavour in this country as also elsewhere to do their duty fearlessly and according to the light that is in them.

Now this unconscious bias is something which no human being can entirely escape and it is no disparagement of

judges to say that they are after all human. Perfection in human life is not possible but an attempt towards it has to be made by each and all of us. In the Constitution with its directive principles and fundamental rights is enshrined a social philosophy which transcends the party ideologies of the day or the moment. With this social philosophy it is incumbent on judges and those members of the bar who have the responsibility as also the privilege of assisting them in the administration of justice to be completely familiar. What I am, therefore, emphasising at is the need for positive attitudes based upon a clear understanding of the theoretical foundations upon which our State is based on the part of those who have to administer the law. It does not follow from this that judges or the courts who have to interpret the meaning of a statute when it is free from all ambiguity and when the law does not permit them to test its reasonableness, can or should import something into the law which is not there but fits in with their philosophy. Whether a particular economic legislation is reasonable or not is in reality a matter in most cases for the judgment of the legislature. But where, of course, it will, if given effect to, negative clearly one of the fundamental objectives to which the directive principles have given emphasis, judges cannot escape the responsibility of interfering, in a case coming up before them, with its operation. Thus the judge's role is as Mr. Justice Douglas wisely puts it that of "a constructive statesman" steeped in the philosophy which underlies the Constitution which it is his privilege to uphold. Fortunately in the numerous judgments of our Supreme Court and our High Courts in recent years there is reason to think that there is evidence of a positive social outlook on the part of our judges. It is to bring out this that I have invited repeated attention to certain observations of eminent judges of the Supreme Court on the role of courts in interpreting the Constitution.

Had our Constitution-makers not provided us with a machinery essential for the independence of our courts, the fundamental safeguards which are an essential feature of our Constitution would have become completely meaningless. After all laws have to be administered by human agencies and

if they are weak and inefficient they can provide no security for the individual and no stability for society. Where judiciaries are weak, inefficient or corrupt societies stagnate and individuals lose their capacity for bold thinking and imaginative action. The independence of the judiciary is thus a vital concern of the community.

The Judge's oath requires him to do justice to all without fear or favour. The Constitution has rightly attached importance to the provision of conditions which would make for the impartiality as also the independence of our judicial tribunals.

Let me just indicate to you what the provisions which help to provide for the independence of our judiciary are.

Our Judges of the Supreme Court, the opinions of which are binding on all courts in this country, are appointed by the President on emoluments fixed for them by the Constitution and they retire at the age of 65. The qualification in their case is that they must have either served as Judges of the High Court or be advocates who have practised for a minimum period of 15 years or are recognised jurists. They have to be appointed in consultation with the Chief Justice of India. The minimum qualification for a High Court Judge is that he must have practised for a period of ten years as an advocate in any court of India or acted as a District Judge for a period of seven years. His appointment too is made by the President in consultation with the Chief Justice and the Governor of the State concerned and the Chief Justice of India. On attaining the age of 60 years High Court Judges retire on a pension proportionate to the number of years they have served. In Britain there is no retiring age for Judges. Once appointed as Judges they cannot look forward to any promotion. For a judgeship of the Court of Appeal is not really in the nature of a promotion as the salary attached to that office is the same as that of a High Court Judge. The House of Lords and the Judicial Committee of the Privy Council stand on a somewhat different footing. In the United States Supreme Court there is no retiring age for judges. Having regard to climatic and other conditions in this country it was not possible for our Constitution-makers to do away with the age limit for retirement. But once having been

appointed our Judges cannot be removed except in the manner provided in clause (4) of Article 124. In other words, what that Article lays down is that a Judge cannot be removed except by an order of the President passed after an address by each House of Parliament supported by a total membership of that House and by a majority of not less than $\frac{2}{3}$ of the members of that House present and voting in the same session on the ground of proved misbehaviour or incapacity. There was a bar on practice after retirement before all courts and tribunals and authorities throughout the territory of India which has by the recent amendment of the Constitution been partially removed in the case of judges of High Courts. Retired High Court judges can now practise before the Supreme Court or any High Court excluding the one of which they were members. These provisions undoubtedly make for the independence of the Bench. Certainly the latest amendment will redress a legitimate grievance of High Court judges and make it easier to recruit prominent members of the profession. The question, however, is whether those provisions can be further strengthened by say raising the age limit in the case of High Court judges and appointing members of the bar at an early age. The quality of our law court will, in the ultimate analysis, depend upon the calibre of the men who are appointed to our courts. It is possible that if the age limit is raised, it will be easier for prominent members of the bar to accept judgeships of our High Courts. It is a tribute to the members of the Indian bar that it has not allowed in the slightest degree the efficiency of our courts to be affected for many eminent members of the bar accept judgeships at heavy pecuniary sacrifice. The quality of our courts at the higher levels is good. But can it be said that we have made any serious move in all the States of the Union in the direction of separating the judicial from the executive functions at the magisterial level in our States? That is a reform which is indicated in our directive principles of State policy and it is connected with the question of the rights of the individuals.

I have invited your attention in these lectures to some of the more salient features of the Constitution in so far as they relate to the individual and the rights which it is intended

that he would enjoy. I have confined myself to a discussion of the rights guaranteed by the Constitution. It has not been possible for me to provide you with a commentary on the meaning to be attached to all those rights or discuss the enormous case law that has gathered round the subject of our fundamental rights. Apart from the Constitution, there are numerous acts, orders, rules and regulations, and bye-laws which expand in one way or the other the rights of the State at the expense of the individuals. Obviously, in these lectures I could not deal with all those provisions which are to be found in our statute books and which are growing in number almost every week.

In a State which has accepted economic and social planning as the basis of its policy this intervention with individual rights is not something which can be said to be of a surprising character. But numerous as some of these restrictions and limitations no doubt are, they do not, I think I would be right in saying, in any sense regiment life or prevent a free and frank expression of opinion or interfere with one's right of choosing one's own profession, trade or occupation or educating people in the correctness of the belief one holds.

The true test of the greatness of a nation is in the contribution that it makes to human knowledge and welfare.

Freedom can only be maintained by people who are prepared in the larger interests of the community to sacrifice, where necessary, their individual rights for the collective good. Our fight for freedom would be meaningless if it did not result in a better standard of living for our people. Having achieved political independence it is now for us to complete our social and economic revolution. That we can do by adhering firmly to the goal of a welfare State which maintains a proper balance between the rights of the society and the individual.

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